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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re JOSEPH FLAUTA on Habeas Corpus.	A131463 (Alameda County Super. Ct. No. H19393B)

Petitioner, Joseph Flauta, was sentenced to a term of 15 years to life in prison in 1994, following his guilty plea to one count of second degree murder (Pen. Code, § 187) committed when he was 16 years old. His minimum eligible parole release date was April 13, 2003. On April 21, 2010, with no opposition from the prosecutor, the Board of Parole Hearings (Board) found him suitable for parole. Governor Arnold Schwarzenegger (Governor), reversed the decision on September 7, 2010. This petition followed.

Flauta contends that the Governor's decision violates his state and federal due process rights because it is not supported by any reliable evidence that he currently poses an unreasonable risk to public safety. We agree, and accordingly grant the petition for writ of habeas corpus to the extent that we vacate the Governor's decision, thereby reinstating that of the Board.

APPLICABLE LEGAL PRINCIPLES

The legal principles applicable to parole suitability decisions, and those governing our appellate review, were most recently explained by the California Supreme Court in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th

1241 (*Shaputis*). Many opinions of the Courts of Appeal have summarized and restated these rules. As applicable to our decision today, we quote the summary by the Second Appellate District in *In re McDonald* (2010) 189 Cal.App.4th 1008, 1019−1023.

"Pursuant to Penal Code section 3041, subdivision (b), the Board [and the Governor] 'must set a release date at a parole suitability hearing unless it determines that "consideration of the public safety requires a more lengthy period of incarceration for this individual." [G]enerally, " 'parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.' " [Citation.]' (*In re Gaul* (2009) 170 Cal.App.4th 20, 31 [(*Gaul*)], quoting [*Lawrence, supra,* 44 Cal.4th at p. 1204] disapproved on other grounds in *In re Prather* (2010) 50 Cal.4th 238 [citation].)

" 'Under the Board's regulations it may properly deny parole to a life prisoner, regardless of the length of time served, "if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." (Cal. Code Regs., tit. 15, § 2402, subd. (a).) In making its decision the Board is directed to consider "[a]ll relevant, reliable information" available to it, including "the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; . . . and any other information which bears on the prisoner's suitability for release." (Cal. Code Regs., tit. 15, § 2402, subd. (b).)' (*Gaul, supra,* 170 Cal.App.4th at p. 31.) The parole regulations also list numerous factors 'tending to indicate' whether an inmate is suitable or unsuitable for parole. [Fn. omitted.] (Cal. Code Regs., tit. 15, § 2402, subds. (c), (d).) These suitability factors are only intended to provide 'general guidelines . . . [and] the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel.' (*Ibid.*) 'In sum, the Penal Code and corresponding regulations establish

that the fundamental consideration in parole decisions is public safety.' (*Lawrence, supra,* 44 Cal.4th at p. 1205.)

"Thus, the 'core determination' involves 'an assessment of an inmate's *current* dangerousness.' (*Lawrence, supra,* 44 Cal.4th at p. 1205, original italics.) The Board and Governor are authorized 'to identify and weigh only the factors relevant to predicting "whether the inmate will be able to live in society without committing additional antisocial acts." ' (*Id.* at pp. 1205–1206, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 [citation] (*Rosenkrantz*).) ' "[I]n directing the Board to consider the statutory factors relevant to suitability, many of which relate to postconviction conduct and rehabilitation, the Legislature explicitly recognized that the inmate's threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law." ' (*Lawrence, supra*, 44 Cal.4th at p. 1219.)

"Consequently, the 'statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.' (*Lawrence, supra,* 44 Cal.4th at p. 1211.) The Board (and the Governor) may, of course, rely on the aggravated circumstances of the commitment offense (among other factors) as a reason for finding an inmate unsuitable for parole; however, 'the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety.' (*Id.* at p. 1214, original italics.)

" 'The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to

consider.' (Cal. Const., art. V, § 8, subd. (b).) '[T]he Governor undertakes an independent, de novo review of the inmate's suitability for parole [citation].' (*Lawrence, supra,* 44 Cal.4th at p. 1204.) The Governor 'must consider all relevant statutory factors, including those that relate to postconviction conduct and rehabilitation. [Citation.]' (*Id.* at p. 1219.) 'Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor. As with the discretion exercised by the Board in making its decision, the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious.' (*Rosenkrantz, supra,* 29 Cal.4th at p. 677.)

"[¶] . . . [¶]

"In reviewing the Governor's decision to reverse the Board's determination that an inmate is suitable for parole, the standard of review is 'whether "some evidence" supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous.' (*Lawrence, supra,* 44 Cal.4th at p. 1191.) '[W]hen a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. [Citations.]' (*Id.* at p. 1212, original italics.) The reviewing court must uphold the decision denying parole if ' "some evidence" in the record supports the conclusion that petitioner poses an unreasonable public safety risk . . . .' ([*Shaputis, supra,* 44 Cal.4th at p. 1255].)

"Every inmate 'is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate's due process right "cannot exist in any practical sense without a remedy against its abrogation." ' (*Lawrence, supra,* 44 Cal.4th at p. 1205, quoting *Rosenkrantz, supra,* 29 Cal.4th at p. 664.) '[I]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal

and remedy any evident deprivation of constitutional rights.' (*Lawrence, supra,* at p. 1211.)

" '[T]he determination whether an inmate poses a current danger is not dependent upon whether his or her commitment offense is more or less egregious than other, similar crimes. [Citation.] Nor is it dependent solely upon whether the circumstances of the offense exhibit viciousness above the minimum elements required for conviction of that offense. Rather, the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citations.]' (*Lawrence, supra,* 44 Cal.4th at p. 1221.)

" 'In sum, the Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor.' (*Lawrence, supra,* 44 Cal.4th at p. 1221, original italics.)

" 'This standard is unquestionably deferential, but certainly is not toothless, and "due consideration" of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.' (*Lawrence, supra,* 44 Cal.4th at p. 1210.)

"Where 'all of the information in a postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public

safety, and the Governor has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required "modicum of evidence" of unsuitability.' (*Lawrence, supra,* 44 Cal.4th at p. 1227.)"

THE RECORD BEFORE THE BOARD AND THE GOVERNOR

1. The Life Crime Murder.

The Governor's decision recited the circumstances of the life crime as follows:

"[¶] According to the probation report, on March 13, 1993, between noon and 1:00 p.m., Flauta and Gentry entered the Fremont Coin Gallery, intending to rob the business. On the way to the robbery, Gentry, who was armed with a gun, told Flauta that he would shoot Miller 'if there was any hassle . . . .' During the robbery, Gentry shot Miller, who died of multiple gunshot wounds to the head.

"[¶] Flauta later admitted that he took gloves to the scene of the robbery and put them on after the shooting. He and Gentry then took gold, coins, trading cards, jewelry, cash, and guns, with an estimated total value of $386,100. Some of this property was later recovered. Flauta stated that he personally received approximately $2,000 in cash plus trading cards from the robbery. He stated that he spent all of the cash on clothes for himself, gifts for friends and relatives, and he gave some money to his mother to pay bills."

He was arrested approximately one month after the murder, and admitted his involvement, although minimizing it. In his statement to probation, he explained that he wanted money from the robbery to move his family. He was surprised when his codefendant just started shooting, and cooperated thereafter in taking items from the store because the codefendant looked crazy and he feared for his own safety. Nonetheless, he told the probation officer that he knew what he was doing was wrong when he did it.

2. Flauta's Preprison History.

Flauta had no criminal convictions or juvenile adjudications prior to the life crime. He had one juvenile charge for graffiti, and was released to home. He has no history of alcohol or drug abuse. He was born in Guam, moving to the United States with his parents at age three. His parents worked, and his family environment was supportive. He attended high school, was active in sports, and was never suspended or expelled. But he was constantly harassed by a gang that dominated the school, attempting to force him to join. He had truancy problems because of attacks by the gang. His family's home was firebombed. His family's request that he be transferred to a different school was denied, and the family could not afford to move.

3. Postconviction History.

It is undisputed that Flauta has been a remarkable, model prisoner. As one member of his 2006 Board put it: "I have never been able to say the number of positive things that I . . . say in a lifer hearing like I . . . say about, you, never. And if there was a bigger word [than] 'Commend,' that's the word I would use to describe what you've done. . . ." As the Governor acknowledged, Flauta has not been disciplined or even counseled during his incarceration. He completed high school, earned his Associate of Arts degree, completed vocational training and earned certifications as a Braille transcriber, closed captionist and lens analyzer. He has held several institutional jobs, and has availed himself of many self-help programs. He has consistently received positive work reports, and has the support of prison personnel.

There is no dispute that he is truly remorseful.

4. Psychological Evaluations.

The record includes three psychological evaluations, 2002, 2005 and the 2009 evaluation prepared for his 2010 hearing. In 2002 he was found to be "definitely below average" risk for dangerousness. In 2005 he was determined to be "in the low range in terms of his risk management for the future" and "in the low to extreme low range on all factors in his propensity to commit violence." His 2009 evaluation found him to be in

the very low risk category of psychopathy, at low risk for general recidivism, and at low risk for violence in the free community.

5. Parole Plans.

As the Governor noted, Flauta has solid parole plans. He has close family ties, and good housing and job offers.

THE GOVERNOR'S DECISION

The Governor's decision relied first on the gravity of the crime itself, explaining that the victim "posed no threat to Flauta or his crime partner, [yet] he was shot multiple times." The Governor then quoted the 2010 Board—the Board that found Flauta suitable for parole. "[Flauta's] behavior after the commitment offense was also atrocious." He "didn't seek any assistance [for the victim]. [He] went about [his] merry way. [He] went back to [his] place with the loot, and put it out on the bed and went through it . . . . [He] didn't turn himself in."

Noting that Flauta told the 2010 Board that "greed set in," the Governor declared that motive "very trivial in relation to the magnitude of the offense he committed."

The Governor next expressed his concern "that Flauta lacks insight into his life offense and has not fully accepted responsibility for the murder, because he has minimized his role in the offense over the years by claiming that he was only an accessory to the crime." Quoting from Flauta's statements to the mental health evaluators and to the Board at his 2002, 2005, 2006, 2008 and 2010 hearings, the Governor highlighted inconsistencies, concluding that they "undermined his credibility." Acknowledging that Flauta told the 2010 Board that he is "just as responsible as . . . [his] co-defendant," the Governor found "the fact that he continually describes the shooting as a completely unexpected event belies his claimed responsibility because it demonstrates that he still seeks to dissociate himself from the murder, despite his crucial role. Additionally, although he admitted at his 2010 parole consideration hearing that greed was a factor in his decision to continue with the robbery after the shooting, he continued assertions that the reported gang harassment primarily motivated his initial decision to participate in the crime are still contradicted by his subsequent choice to spend a large

portion of his proceeds from the life offense on clothes for himself and gifts for his friends. Flauta's repeated attempts to minimize his role in the murder and blame the gang harassment of his family for his actions indicate that he has not developed an adequate understanding of the circumstances of the offense and that he is still capable of rationalizing future crimes, particularly when he considers himself only an accessory. This evidence of his lack of insight into his murderous conduct renders his life offense still relevant to my determination that he poses a current, unreasonable risk of danger to the public if released because Flauta cannot ensure that he will not commit similar crimes in the future if he does not completely understand and accept full responsibility for the offense."

DISCUSSION

We are required to uphold the Governor's decision if it is supported by a modicum of evidence. The law is settled that "the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*Lawrence, supra,* 44 Cal.4th 1181, 1211.) Here, the evidence of Flauta's rehabilitation is undisputed. The commitment offense is "temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur" (*id.* at p. 1191), including Flauta's exemplary in prison record, his in prison rehabilitative efforts, his extensive and solid parole plans and every single psychological evaluation prepared for the several Board hearings since 2002.

The Governor viewed Flauta's "lack of insight" as the "other evidence" coupled to the crime to point to dangerousness. But as we have previously noted, it is the decision that must be supported by the evidence, "not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence, supra,* 44 Cal.4th at p. 1212.)

When scrutinized, while the record does contain a modicum of evidence Flauta previously lacked full insight, there is no "rational nexus" between that prior lack of insight and his current threat to public safety. The Governor is correct that Flauta's statements over the years are not precisely the same. But "expressions of insight and

remorse will vary from prisoner to prisoner and . . . there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior." (*Shaputis, supra,* 44 Cal.4th 1241, 1260, fn. 18.) Lack of insight must be "demonstrably shown by [evidence in] the record." (*In re Powell* (2010) 188 Cal.App.4th 1530, 1542.)

Upon a careful review of the record, it is apparent Flauta's statements about the facts of the crime are consistent. His increasing insight into his behavior and his thought processes at the time of the offense have changed. He has always expressed remorse for, and admitted his involvement in the crime. But with each psychological evaluation and each parole hearing his understanding of what prompted his actions has grown—a fact emphasized by the district attorney in her statement to the Board. He did not minimize his involvement at the 2010 hearing.

Flauta was 16 at the time of the crime. " ' "[T]he general unreliability of predicting violence is exacerbated in [a] case by . . . petitioner's young age at the time of the offense [and] the passage [of] years since that offense was committed . . . ." ' ' "[I]ndeed, '[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.' [Citations.] '[I]nexperience, less intelligence and less education make a teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than as an adult.')" ' [Citation.]" (*In re Barker* (2007) 151 Cal.App.4th 346, 376−377.)

At the 2010 hearing, Flauta directly confronted the fact that in addition to his unrealistic belief that the crime would earn him money to escape the gang harassment, he was greedy, and liked the excitement of living life in the fast lane. The record fails to support the Governor's rationale that Flauta's statements at the 2010 hearing continued to demonstrate lack of insight. In fact, the Board spoke at some length about Flauta's prior failure in "not owning up to your full participation in the commitment offense," and expressed its belief that he had done so at the hearing, and in the psychological

evaluation. Flauta had explained "although he did not join a gang, he was influenced by seeing the money, clothes, cars and living-fast lifestyle of this group. He acknowledges that this was one of the major temptations to him to committing the crime . . . . While he wanted to help his family get out of the area they lived in, he also wanted luxury things for himself." The Board, commenting on the evaluation, concluded that Flauta is aware of his emotional triggers, and has a plan to deal with them upon release.[1]

To uphold the Governor's analysis of Flauta's statements over the years would set a rule that a prisoner must demonstrate immediate insight into his criminal conduct, and provide only consistent, rote statements in the succeeding years of incarceration. Nothing in the Governor's decision or the record suggests that further incarceration will alter or improve Flauta's insight. Moreover, at the 2010 hearing, he accepted responsibility and acknowledged how his participation led to Miller's death.

"But for the immutable nature of his life . . . crime, and the modicum of evidence that he [previously] did not have insight into the commission of the crime . . . all the applicable regulatory criteria indicate[d] that [Flauta] is suitable for parole" (*In re Twinn* (2010) 190 Cal.App.4th 447, 471 (*Twinn*)). This Board reached a similar conclusion. Nothing in the record indicates Flauta poses an unreasonable risk to public safety.

DISPOSITION

The petition for writ of habeas corpus is granted to the extent the decision of the Governor reversing the Board of Parole Hearings is vacated. The Board's decision finding Joseph Flauta suitable for parole is reinstated. "[W]e direct the Board to proceed in accordance with its usual procedures for release of an inmate on parole unless within 30 days of the finality of this decision the Board determines in good faith that cause for rescission of parole may exist and initiates appropriate proceedings to determine that question." (*Twinn, supra,* 190 Cal.App.4th at p. 474.) This opinion is final as to this court immediately.

[1] At previous parole hearings, the Board focused on his lack of insight into the reasons for his crime and told Flauta to examine his role and what caused him to participate. He did just that as the 2010 transcript demonstrates.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Dondero, J.